

2005-2006 UPDATE COURSE

SECTION 3

RULE A.0105 – ADVERTISING

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LEARNING OBJECTIVE: At the conclusion of this Section, licensees should have a thorough understanding not only of the explicit requirements of their advertising rule, but of several other related issues arising from or pertaining to this rule.

Basic Requirements

Property Owner's Consent

Rule A.0105, "Advertising," is not very long – it only has five subparagraphs and consumes barely half of one page. And even though most of the rule has existed for nearly 30 years, most likely the vast majority of licensees rarely have bothered to read it or refer to it for guidance outside of any prelicensing classes they may have taken. The most basic requirements are found in subparagraphs (a) and (c), with the most fundamental requirement set forth in (c)(2) which states:

"A licensee shall not advertise or display a "for sale" or "for rent" sign on any real estate without the consent of the owner or his or her authorized agent."

This should be patently obvious. How could one hold out to the public that a property is for sale or lease if one has not discussed it with the owner and obtained the owner's consent? Additionally, if a licensee is advertising property, presumably he/she is acting on behalf of or representing the property owner. Rule A.0104(a) requires licensees to have a *written agency agreement from the inception of the relationship* whenever they undertake to represent a property owner in *any* capacity, whether a sales or lease transaction. Does this apply to commercial transactions?? Clearly. Look at the rule – "shall not advertise or display a "for sale" or "for rent" sign on *any* real estate ..." without the prior consent of the owner or the owner's authorized

agent. Thus, *before a licensee may begin advertising a property in any manner for any purpose, residential or commercial, sales or lease, the licensee must have the consent of the property owner.*

Must the consent be in writing? While not explicitly required by Rule A.0105(c)(2), as noted above, Rule A.0104(a) requires a written agency agreement with every property owner, whether sales or lease, from the inception of the relationship, which agreement defines the licensee's and property owner's respective rights and obligations. Typically, these agreements address, among other things, whether and how the licensee may market the property, which eliminates disputes as to the issue of consent. Thus, while written consent may not be expressly required, the prudent agent will incorporate that consent into his or her listing agreement or property management agreement to avoid proof problems down the road and to evidence the consent required by Rule A.0105(c)(2).

Even though the prior consent of the property owner is fundamental and may have been orally obtained, know that licensees continue to be disciplined for advertising property without first having entered into the appropriate written agency agreement with the property owner. If there is any advertising copy in an owner file, then the transaction file also must contain a written agency agreement. Similarly, a broker should have an owner's consent before using any images of the owner's property. An example is the woman who called to report that in perusing MLS listings online, she found her own home, photograph, patio furniture, address and all, listed for sale, even though she had never met the alleged listing agent and had no intentions of selling her home which she had purchased one year earlier. When contacted, the listing agent explained that a house similar to the owner's was being built on a lot the agent had listed, so she just substituted a photo of the owner's house to depict the finished product without seeking the owner's prior consent. Overly zealous licensees also have been disciplined for placing "for sale" signs on property without the consent or knowledge of the owner in hopes of generating phone calls and possible customers or clients who they then direct to other properties that are available for sale or lease. Such actions constitute misrepresentation and improper conduct under Real Estate License Law.

Note also that *not only is consent required to advertise, but also specifically to place signs on ANY property.* This is true not only for the owner-seller, but for directional or other signs that may be placed on the property of others. Permission should first be obtained from the property owner before "planting" any sign. Licensees should inquire as to whether there are restrictions within a subdivision or community that either prohibit or limit the type or location of signage which may be displayed. Be aware that *state law prohibits placing any private signs on rights-of-way, medians or other property owned by the State.* Similarly, licensees should check with local governmental units (county or municipal, as applicable) regarding any restrictions on the size or placement of signs and to obtain permission to place any signs on streets or rights-of-way owned by local governmental units. As of Fall 2005, the Commission had six inquiries pending as to the unlawful posting of directional or for sale signs on highway rights of way.

"Blind Ads"

Rule A.0105(a) addresses the second most basic requirement, namely, that the advertisement "... shall *conspicuously* indicate that it is the *advertisement of a broker or brokerage firm*" This subparagraph reads in its entirety:

(a) Blind Ads. A licensee shall not advertise the sale, purchase, exchange, rent or lease of real estate, for another or others, in a manner indicating the offer to sell, purchase, exchange, rent, or lease is being made by the licensee's principal only. Every such advertisement shall conspicuously indicate that it is the advertisement of a broker or brokerage firm and shall not be confined to publication of only a post office box number, telephone number, street address, internet web address or e-mail address.

No signage or form of print or media advertising placed by a licensee may give the impression that the property is being marketed for sale, exchange or lease by the property owner directly when in fact the property owner has hired a licensee to represent the property owner in the transaction. The same holds true when a licensee is representing a buyer or lessee and advertises the principal's desire to purchase or lease property. The clear intent of the rule is that the public know who they are contacting; thus, *the name of the broker or brokerage company must appear in the advertisement and on any signs*. Note that ***the rule specifically requires that a broker accept responsibility for the advertisement***. Thus, the name of a provisional broker is insufficient. A provisional broker's name may appear in an ad, but in addition, the name of the brokerage company with which the provisional broker is associated or the name of the provisional broker's broker-in-charge also must appear in the ad. If it is clear from the name of the company that it is engaged in real estate brokerage, then the term "broker," need not appear after the company name, e.g, Smith Realty Company, or Carolina Real Estate, Inc.. If only an individual broker's name appears in the ad, then the term "broker" should follow the person's name.

Company policy may dictate whether the company's name must appear in all advertisements and on all signs, including those placed by its associated brokers. Typically, it is the Company which holds and is the party to the agency agreements, not the individual licensee working with the client. The Company is the primary agent of the client, extending its services through its associated agents who are representatives and agents of the Company and for whose behavior the Company may be civilly liable. Provisional brokers are not permitted to advertise without the consent of their broker-in-charge pursuant to Rule A.0105(c)(1) which states:

(c) Authority to Advertise.

(1) A provisional broker shall not advertise any brokerage service or the sale, purchase, exchange, rent or lease of real estate for another or others without the consent of his or her broker-in-charge and without including in the advertisement the name of the broker or firm with whom the provisional broker is associated.

Thus, brokers-in-charge would be well-advised to implement some policy or procedure which allows them to review their provisional brokers' advertising before it is disseminated. While brokers are not required by rule to have the consent of their broker-in-charge before they advertise, brokers-in-charge should be aware that under Rule A.0110(a)(3) they nonetheless are responsible for supervising **all advertising** being done by *any licensee* in their office as the advertising generally is being done in the name of the company, since the company holds the agency contract, and may be liable for the acts or representations of its affiliated agents.

CAUTION: While the subject of *limited service agreements* and duties owed thereunder is beyond the scope of the present discussion, licensees who attempt to limit their

services to merely placing an advertisement in a Multiple Listing Service or other media should understand that they still must comply with all Real Estate License Law and Commission rules insofar as they are applicable. The licensee still owes fiduciary duties to his or her principal that cannot be disclaimed and whatever services the licensee contracts to provide must be competently rendered. The licensee must have a written agency agreement with the property owner that should clearly define the limited services the licensee will provide and should address whether the property owner may advertise independently of any advertising placed by the licensee. The licensee must include his/her name in any advertisement, identify him/herself as a broker, and indicate whether and how the public may contact the property owner directly.

Licensees as Principals

When a licensee is a principal in the transaction, that is, the licensee **is** the buyer, seller, lessor, or lessee, must s/he disclose that s/he is a licensee? The answer depends on whose rules one is following. Note that Commission Rule A.0105(a) requires all advertising to include the name of a broker or brokerage company when a licensee is advertising real estate “...*for another or others* ...” Thus, read literally, the rule does not seem to apply to situations where a licensee is *not* representing others, but rather is a party-principal in the transaction. Similarly, there is no statute which requires licensees to disclose their license status when they are not representing others in a transaction. Nonetheless, the Commission strongly recommends that licensees inform others with whom they are dealing that they in fact have a broker or provisional broker license, even if the license is inactive or expired, when the licensee is representing him or herself in a transaction. While a licensee might not be subject to disciplinary action for failing to make this disclosure, it is in his/her own best interests to advise the other party or parties that s/he in fact has or had a license to avoid complaints later of unfair advantage by virtue of the licensee’s education and experience. Informing the other side that one has or had a license defuses that potential accusation and puts the other side on notice that if they want representation, they should get their own agent.

CAVEAT: While neither License Law nor Commission rules mandate this disclosure (even though it is *strongly* recommended that licensees disclose their license status), be aware that the REALTOR® Code of Ethics requires licensees who are members of the REALTOR® organization to disclose *in writing prior to making an offer* that they are a REALTOR® (i.e., a broker or provisional broker) whenever they are a party to a transaction. (See Article IV, Code of Ethics, and Standard of Practice 4.1.)

As an aside, licensees should be aware that they will be held to a higher standard even when they are a *party* in a transaction and not acting as an agent for another. G.S. 93A-6(b)(3) provides that a licensee may be subject to disciplinary action if s/he has “... violated any of the provisions of G.S. 93A-6(a) when selling, leasing, or buying his or her own property.” The primary effect of this is to prohibit licensees from engaging in misrepresentations, making false promises, failing to disclose material facts, acting for anyone other than him/herself without the knowledge of all involved, paying consideration to unlicensed persons, engaging in the unauthorized practice of law, or engaging in any conduct which constitutes improper, fraudulent or dishonest dealing. Note that, unlike unlicensed property owners, *licensees, whether an entity or an individual, must disclose material facts when selling or leasing property they own.*

Note that if a licensee seeks to work through a real estate company when the licensee is selling, purchasing, or leasing his/her own property, then the licensee must have the appropriate written agency agreement with the company and the agent representing the licensee is acting in a fiduciary capacity to the licensee-principal and must comply with all license law and rules. Thus, any advertising done by the company for the property must disclose that it is the advertisement of a broker and not the licensee-owner.

Names

Subparagraphs (b) and (d) of Rule A.0105 both address the issue of names. Rule A.0105(b) states:

(b) Registration of Assumed Name. In the event that any licensee shall advertise in any manner using a firm name or an assumed name which does not set forth the surname of the licensee, the licensee shall first file the appropriate certificate with the office of the county register of deeds in compliance with G.S. 66-68 and notify the Commission in writing of the use of such a firm name or assumed name.

Sole Proprietorships

Thus, if Broker Sally Jones is conducting her real estate brokerage practice as a sole proprietor under the name Jones Realty or Jones Real Estate or something similar (whether as a sole practitioner or with 25 affiliated agents), then she does *not* need to register the name Jones Realty with the register of deeds in every county where she maintains an office because the name under which she is doing business includes her surname, and even though common, still identifies her to the public. If she wanted to ensure that no one else used the same business name in any given county where she did business, then it would behoove her to register that name, even though she is not required to do so under Rule A.0105(b), so no one else could use the identical business name in that county. For example, if she registered Jones Real Estate, then no one else could use that name in the counties where she had registered it. If Michael Jones, a broker/sole proprietor, wanted to do business in those same counties, he could do so as Jones Realty, but not as Jones Real Estate. However, if Ms. Jones is doing business as a sole proprietor under a name which does *not* include her last name, e.g., Sally's Homes for You, or Carolina Sunshine Homes, or whatever, then she *must* register that name so the public knows who Sally, or Carolina Sunshine Homes, is.

Licensees should do business under their current legal name, and can only have *one* "legal name" at any given time, even though they may be known socially by some other name. Typically this applies to females more than males, as men rarely change their legal names or surnames.

Example: Sally was known in the community for 25 years as Sally Jones, which is the name on her broker license. At age 55 she marries Harry Smith and legally assumes his surname, changing her name on credit cards, her Social Security card, her driver's license and voter's registration to Sally Smith, but because everyone knows her as Sally Jones, she continues to use that name in her brokerage practice. This is unacceptable. She is now using a name that no longer is her legal name, and an individual may not use a personal name other than their true legal name as an assumed name. Sally should have thought about this and discussed it with Harry

before she chose to adopt his surname. She could have retained Sally Jones as her legal name and thus continued to use that in her brokerage practice, while using her husband's surname socially, if she wanted, under the common law, so long as she was not using it for any fraudulent purpose. Or she could have chosen to add her husband's surname to hers and legally become Sally Jones-Smith, in which case she could have engaged in brokerage under her hyphenated surname, Jones-Smith, but not just as Jones, as that no longer is her legal name.

Bottom line is that *if a licensee changes his/her legal name*, whether by marriage, divorce, adoption, or judicial legal name change, *s/he should notify the Commission and request that his/her broker or provisional broker license be reissued in his/her current legal name*. (See the March 2004 edition of the Real Estate Bulletin for an article concerning the use of nicknames.)

Business Entities

If a licensee forms an entity under which to conduct his/her brokerage activity (that is, to represent others), such as a corporation or a limited liability company or a partnership or anything other than him or herself as a sole proprietor, then the licensee, after creating the entity, first must apply to the Commission for a firm license for his or her entity *before* beginning to engage in brokerage activity under that entity. Failure to obtain a firm license results in an unlicensed entity illegally engaging in real estate brokerage contrary to G.S. 93A-1 which states in pertinent part:

... it shall be unlawful for any person, partnership, corporation, limited liability company, association, or other business entity in this State to act as a real estate broker, or directly or indirectly to engage or assume to engage in the business of real estate broker or to advertise or hold himself or herself or themselves out as engaging in or conducting such business without first obtaining a license issued by the North Carolina Real Estate Commission

Corporations, limited liability companies, and limited partnerships (but not regular partnerships) are required to register with the Secretary of State before they may do business in North Carolina. Under G.S. 66-68, referenced in Rule A.0105(b), so long as the corporation, limited liability company or limited partnership does business under its legal name, i.e., the name it registered with the Secretary of State, then it does not need to register that name with the register of deeds in every county in which it maintains an office, even though that name may not include the surname of any principal. For example, Sally Jones creates a corporation called Carolina Sunshine Homes, Inc. under which to conduct her brokerage activity and registers that corporation with the Secretary of State. Even though Sally's surname does not appear in her corporation's name, she does not need to register that name with any register of deeds anywhere so long as that is the name under which she does business. The same would be true if Sally had formed a limited liability company or limited partnership and registered that entity with the Secretary of State, as the public can check the Secretary of State's records for information as to ownership and registered agents. Having formed the entity and having registered it with the Secretary of State, Sally then would have submitted a firm license application to the Commission for her entity and once issued, she could commence brokerage activity under her entity.

Are there any restrictions on what I may name my entity? **YES**. Rule A.0105(d) states:

(d) Business names. A licensee shall not include the name of a provisional broker or an unlicensed person in the name of a sole proprietorship, partnership or non-corporate business formed for the purpose of real estate brokerage.

Assume that Sally forms a limited liability company with Martha Brown and Jackie Page, neither of whom are licensees. All three are members (owners) of the member-managed limited liability company, which they name Brown, Jones & Page, LLC and register with the Secretary of State. While the Secretary of State will accept the name and registration, the North Carolina Real Estate Commission will not, because the limited liability company's name violates Rule A.0105(d) because it includes the names of unlicensed persons. Had the three formed a corporation, they could have named it Brown, Jones & Page, Inc., as corporate names may contain the names of unlicensed persons or provisional brokers, but no other entity may at present. If they wished to remain a limited liability company, then for real estate firm licensing purposes, they would have to amend the name with the Secretary of State to one which does not include either Brown or Page in the name of the limited liability company, e.g., Three Ladies Realty, LLC, which could then be issued a firm real estate license. While Brown and Page may not engage in real estate brokerage themselves, since neither is individually licensed, they may be owners of the entity and share in the net proceeds generated by duly licensed individuals' activity who are employed by the limited liability company as associated brokers or provisional brokers.

If an entity uses an assumed name for its business pursuits, then it too must register the assumed name with the register of deeds in every county where it has a "place of business." (See G.S. 66-68, et. seq, reprinted at the end of this article.) Regular partnerships (as opposed to limited partnerships) are not required to register with the Secretary of State and typically contain the names of the partners in the partnership name. If Brown, Jones and Page were to form a partnership, rather than a limited liability company, they once again would not be permitted for licensing purposes to include Brown and Page's names in the name of the partnership. If they called their partnership "Three Ladies Realty," they would first be required to register that name with the register of deeds in at least one county where they intended to maintain a "place of business," i.e., an office, before they filed for their firm license.

The firm broker license is issued in the legal name of the entity. Generally, the legal name of the entity is the name under which it registered with the Secretary of State. If it is not required to register with the Secretary of State, then its legal name is the name under which it does business, and if that name does not (or can not, because of Rule A.0105(d)) include the principals' surnames, then the entity's assumed name with proof of registration with at least one register of deeds should be submitted with the firm license application.

The last wrinkle is when an entity does business under its legal name, as well as under an assumed name. For example, Three Ladies Realty LLC engages in general brokerage under its legal name as registered with the Secretary of State, which also is the name on its firm license; two years later, when asked to market a particular subdivision, they decide to do so as "Sisters Cypress Gardens." Before they may begin advertising, they first must file with the register of deeds in the county where the subdivision is located a certificate stating that Sisters Cypress Gardens is an assumed name for Three Ladies Realty, LLC. If an entity plans to routinely engage in brokerage under an assumed name, rather than or in addition to its legal name, there is

a space on the firm license application where it can indicate that and the firm license will contain both the company's legal name, as well as its trade (assumed) name, e.g., Brown, Jones & Page Inc., dba Carolina Sunshine Homes. Rule A.0105(c)(1) states that an entity shall "... notify the Commission in writing of the use of such ... assumed name."

Permissible Business Purposes

Generally, one may form an entity for multiple purposes. In fact, the articles of some entities broadly state that the entity is formed for and may engage in any legally permissible business. Thus, one could form a corporation or a limited liability company or partnership or whatever under which to engage in real estate brokerage, appraisal, home inspections and photography. While the entity would need a firm broker license and must employ individuals who are duly licensed to practice in each of the various fields if required by other statutes or rules, the entity could receive revenue generated from each of its four different ventures. The exception to this statement is that there are certain services which have been designated by the General Assembly as "professional services" which are defined in G.S. 55B-2. If one forms an entity for the purpose of providing one or more of the enumerated twenty-two professional services, then the entity must be either a professional corporation, or professional limited liability company, or in some instances a professional association. The relevant point is that real estate is *not* one of the designated "professional services," and thus *real estate brokerage may not be one of the business purposes of a professional corporation or professional limited liability company.*

For example, forestry, engineering and land surveying, geologists, soil scientists, architects, and landscape architects are all designated "professional services." Thus, if one forms a corporation, limited liability company, limited partnership or other entity to render any of these services, the entity should be designated as a professional entity. Because real estate brokerage is *not* among the services classified as "professional services," it may not be one of the services rendered by any entity that also provides a professional service. If one is a registered forester as well as a real estate broker, or a licensed engineer and a real estate broker, one could not have one company that provides both services, because the forestry and engineering must be provided by a "professional" entity, whereas real estate brokerage cannot be part of a "professional" entity. One must either form two separate entities for each purpose, one being a professional entity and the other being a regular corporation or limited liability company or partnership or whatever, or one could engage in one service as a sole proprietor and form the appropriate entity for the other service. Note too the general rule that professional entities may only be formed for one purpose and may not combine multiple business purposes, although there are a few exceptions set out in G.S. 55B-14.

Note also that an unlicensed entity may not receive compensation from brokerage activity, even when the service is rendered by an employee who has an active broker license. For example, an engineering firm which is a professional corporation may employ an individual who has a broker license to identify property for rights of way or easements for its customers to lease or purchase. However, if the interest in the property (i.e., the right of way or easement) passes directly from the property owner to the engineering firm's customer, then any compensation for this service must be paid directly to the broker-employee, presumably by either the property owner or the grantee of the right-of-way or easement. The compensation may *not* be paid to the engineering company and then to the employee because the engineering company does not have a firm broker license and as an unlicensed entity, it may not receive any compensation or consideration arising from brokerage activity (i.e., real estate for others for

compensation/consideration). The additional complicating wrinkle is that because the engineering company is a professional corporation (because engineering is a “professional service”), it is not a candidate for a firm broker license because real estate brokerage is not a professional service.

Licensees should be aware both of the restrictions arising from the “professional services” statutes as well as from Rule A.0105(b) and (d) regarding permissible names of entities if they wish to avoid delays in processing firm broker license applications. Licensees also should be familiar with the requirements of Rule A.0502, “Business Entities,” as to what is required to obtain a firm broker license and who may serve as qualifying broker. Frequently, the attorneys they consult to form the entity may not be aware of these restrictions, particularly those arising from Commission rules, as few attorneys have cause to read these rules.

Content of Advertisements

Beyond the requirements previously discussed concerning blind ads and permissible names of companies, there is only one other disclosure required by Rule A.0105, which was added as subparagraph (e) effective July 1, 2004. It requires that any advertisement by or including the name of a limited non-resident commercial licensee specifically identify the licensee as a “Limited Nonresident Commercial Real Estate Broker (or Provisional broker),” as applicable. Further, in representing their licensure in North Carolina, the nonresident must disclose that s/he is a Limited Nonresident Commercial Real Estate Broker or Provisional broker.

Other than the foregoing, the Commission does not dictate what must or must not appear in advertising, although other State or Federal laws may impact content, such as State Fair Housing laws and federal Truth-in-Lending laws. For example, the Commission does not require that square footage of a building be included in an ad. However, whatever representations are made, must be accurate and it is incumbent on the licensee placing the ad to verify its accuracy, as well as the broker-in-charge who, as previously mentioned, is responsible for supervising **all** advertising emanating from his or her office.

Licensees should exercise caution and check their facts before making representations about permitted uses or occupancy, whether in a sales or lease transaction. When making statements concerning occupancy, licensees should check local ordinances or restrictive covenants for limitations on the number of unrelated occupants. Such limitations may be found in definitions of “single family” use. Similarly, where a building has on-site sewage disposal, licensees should be alert to the limitations imposed by the original or most recent improvement permit, which may be found in public records. In other words, if the dwelling is only permitted for three bedrooms, then it may only be advertised as having three bedrooms, not the four or five it appears to have because the current owner or occupant is using what was intended as a den or playroom or huge walk-in closet as a bedroom. Recall that in permitting on-site sewage systems, the health department assumes two persons per bedroom. Thus, a permit for a three bedroom dwelling may be advertised as sleeping six, not more. However, even if the permit is for three bedrooms, thus potentially sleeping six, a local ordinance or restrictive covenant which only allows up to four unrelated people to occupy the dwelling will restrict the permissible occupants from six to only four.

Licensees should also exercise caution in declaring property “SOLD” on their signage. If in fact the closing has not occurred, then the property is not really sold yet. It may be “under contract” or the “sale pending,” but it is not really a done deal, as much as the licensee may wish it were, until the settlement meeting has been held and the deed recorded, and to indicate otherwise is misleading, if not outright misrepresentation. Further, licensees have no right to refuse to present an offer they may receive from an interested purchaser even though the property already is under contract. Rule A.0106 requires licensees to present ALL offers immediately, but in no event later than five days from receipt. It is the *seller’s* place to decide what s/he wants to do with any given offer, although licensees should advise their seller-client that they already are under contract, if applicable, that it is not wise to sell the same property twice simultaneously, but that they might accept it as a back-up offer only, using the appropriate addendum, and if the seller has further questions, suggest they consult a lawyer.

Federal Truth in Lending Laws

The federal Truth in Lending laws were originally enacted in 1968 and have been revised a couple of times in subsequent years, most notably in 1982 when the Act was simplified and Regulation Z was revised. The basic purpose of the Act is to provide consumers with full disclosure of the cost of credit, namely credit charges, which they may incur in certain consumer credit transactions, i.e., those for a personal, family or household purpose, where a finance charge is imposed or where repayment exceeds four installment payments. Covered transactions include personal consumer loans of \$25,000 or less and mortgages to individuals where the loan is not for a business, commercial, or agricultural purpose, e.g., personal residences. While the Act applies primarily to lenders, Regulation Z governs ***any advertisement for consumer credit, regardless of who places the advertisement***, which is why licensees must be cognizant of its requirements. The relevant question is whether the advertisement promotes consumer credit. If it does, then the person or entity responsible for the ad must comply with Regulation Z.

Basically, be aware when proofing advertising that *if any numbers are stated*, whether:

- the amount of down payment (e.g., \$2000 down, or 5% down, or 95% financing), or
- monthly payment amounts (e.g., \$700 per month, or only \$9 per \$1000 borrowed), or
- the dollar amount of any finance charge (average interest less than \$300 per month) or
- number of payments or period of repayment (e.g. 240 payments, 30 year mortgage)

the foregoing are all considered “trigger terms” which will require disclosure *in the same advertisement* of the following, namely:

- the amount or percentage of the down payment,
- the terms of loan repayment, and
- the annual percentage rate (using that term or “APR”) and if adjustable, notice of same.

Statements which do not include any numbers generally are permissible and do not trigger disclosure of the other financing terms. Examples of such statements include: “no down payment,” “low down payment,” “low monthly payments,” “long-term financing available,” “low financing charges,” or “no closing costs.” Secondly, if finance charges are expressed as a rate in the advertisement, then they must be stated in terms of “annual percentage rate” or “APR,” using either that term or the abbreviation. While the simple interest rate also may be included in the advertisement, it may be no larger than the font used to disclose the APR. An advertisement may state just the annual percentage rate, using those specific words or the

abbreviation (and *not* just the simple interest rate) *without* the other disclosures which must be included if any of the trigger terms are used.

State Fair Housing Laws

The North Carolina Fair Housing Act is found at Chapter 41A of the North Carolina General Statutes. The law broadly defines a “real estate transaction” as “... the sale, exchange, rental, or lease of real property.” It is an unlawful discriminatory practice for ***any person in a real estate transaction, including unlicensed property owners who might otherwise be exempt***, to:

Make, print, circulate, post, or mail or cause to be so published a statement, advertisement, or sign, or use a form or application for a real estate transaction, or make a record or inquiry in connection with a prospective real estate transaction, which indicates directly or indirectly, an intent to make a limitation, specification, or discrimination with respect thereto [G.S. 41A-4(a)(6)]

because of race, color, religion, sex, national origin, handicapping condition, or familial status. In other words, **no one may state, verbally or in print, that he or she is making any decision in a real estate transaction due to or arising from any of the protected classes, whether in a residential or commercial lease or sale of real property, even though the individual may otherwise be exempt from the requirements of the Act.** [Note: while the Act is entitled “Fair Housing,” the definition of “real estate transaction” involves *any* sale or lease and is not expressly limited to residential real property. The prohibition in 41A-4(a)(6) applies to “any person in a real estate transaction” which the NC Human Relations Commission interprets as including commercial transactions.]

While licensees no doubt are aware of prohibited practices, they include:

- refusing to engage in a real estate transaction;
- refusing to rent or sell property;
- discriminating in the terms or conditions of a sale or rental;
- refusing to receive or failing to transmit a bona fide offer;
- indicating that property is not available when it actually is;
- refusing to negotiate;
- steering a person towards or away from particular property;
- threatening, intimidating, retaliating against or otherwise interfering with the use and enjoyment of property;
- “blockbusting,” i.e., scaring a person into moving out of an area because persons from other countries are moving in.

NOTE: to “offer, solicit, accept, use, or retain listing of real property with the understanding that any person may be discriminated against in a real estate transaction or in the furnishing of facilities or services in connection therewith ...” is expressly prohibited under G.S. 41A-4(a)(7). Rule A.1601 states: “Conduct by a licensee which violates the provisions of the State Fair Housing Act constitutes improper conduct in violation of G.S. 93A-(6)(a)(10).”

Lastly, as our population becomes more multi-cultural, licensees should be wary of declining to work with non-English speaking people. Such a blanket refusal may be viewed as discriminating based on national origin. Licensees are not required to provide translators for

non-English speaking persons. However, if the non-English speaking person is accompanied by their own translator who is able to facilitate effective communication between the licensee and the client or customer, the licensee should have some legitimate reason other than the language barrier if s/he chooses not to work with the individual.

Do Not Call and Do Not Fax

The federal “Do Not Call” rules apply to licensees whenever they are attempting to promote their services as a real estate broker or provisional broker. Every office should check the national registry to update their lists of individuals who have registered their residential or wireless telephone numbers and instruct their associated licensees to consult the list before telephoning anyone to solicit business. Since January 1, 2005, telemarketers and “sellers” are now required to search the national registry *at least once every 31 days*, rather than once every 90 days as under the original rules. To be safe, real estate licensees/companies should assume they fall within the definition of “seller” and should ***check the national registry monthly***. One may access the registry via the Federal Trade Commission’s website (www.ftc.gov) after obtaining an account number for one’s business.

Telephone solicitations which are not otherwise prohibited may be made only between 8:00 a.m. and 9:00 p.m. Any solicitor making a call must provide his/her name, identify the name of the company on whose behalf they are calling, and give either a telephone number or address where the consumer may contact the entity. A licensee may telephone a consumer whose telephone number *is* registered only if s/he has *written permission* from the consumer or if the company has “an established business relationship” with the consumer, meaning the company had an agency relationship with the consumer within the preceding 18 months or the consumer contacted the company to inquire about services within 3 months preceding the telephone solicitation.

Be aware that contrary to the National Association of REALTORS® efforts, the Federal Communications Commission ruled that “for sale by owner” and expired listings (belonging to others) are **not** excluded from the Act’s provisions. In other words, licensees may **not** call persons attempting to sell their own property nor listings previously belonging to other companies if the individuals have registered their telephone number and if the purpose of the call is to solicit business. Licensees may only call “for sale by owners” if they have a prospective buyer who is interested in seeing the property.

Effective January 1, 2005, sending unsolicited advertisements to *any* fax machine, *business or residential*, is prohibited, including fax servers and personal computers. An unsolicited advertisement is “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.” There was an “established business relationship” exception for this rule, similar to that for the Do Not Call rule, which exception was going to be eliminated from the Do Not Fax rules originally as of January 1, 2005, which was extended through June 30, 2005 and then through January 9, 2006 to allow Congress time to consider legislation which would preserve the exception. Congress enacted the Junk Fax Prevention Act on July 9, 2005, amending the Telephone Consumer Protection Act to allow businesses to send unsolicited advertisements by facsimile to consumers and businesses with which they have an *established business relationship*. Unlike the 18 month and 3 month time periods for the established business relationship exception for Do Not Call purposes, there do not appear to be any time

limitations for the exception in the fax arena. However, the sender must include on the first page of the unsolicited fax both contact information and a Notice of how to “opt-out” of receiving future fax advertisements.

The business or entity sending any fax, or on whose behalf the fax is being sent, must identify itself on the first page of the fax or in the top or bottom margin of each page, must include a telephone number, and the date and time the fax is sent. Note that the person on whose behalf the unsolicited advertisement is sent may be liable for any violations even if they did not physically send the fax themselves. Note too that while Federal laws usually prevail over conflicting State laws, in this instance the federal law expressly allows State law to be more restrictive than its federal counterpart. However, while North Carolina has enacted laws concerning telephone solicitations, there are no state laws at present regarding unsolicited facsimile transmissions.

RULE A.0105 AND STATUTES RE: ASSUMED NAMES

Rule A.0105 - Advertising

(a) Blind Ads. A licensee shall not advertise the sale, purchase, exchange, rent or lease of real estate, for another or others, in a manner indicating the offer to sell, purchase, exchange, rent, or lease is being made by the licensee’s principal only. Every such advertisement shall clearly indicate that it is the advertisement of a broker or brokerage firm and shall not be confined to publication of only a post office box number, telephone number, or street address.

(b) Registration of Assumed Name. In the event that any licensee shall advertise in any manner using a firm name or an assumed name which does not set forth the surname of the licensee, the licensee shall first file the appropriate certificate with the office of the county register of deeds in compliance with G.S. 66-68 and notify the Commission in writing of the use of such a firm name or assumed name.

(c) Authority to Advertise.

- (1) A provisional broker shall not advertise the sale, purchase, exchange, rent or lease of real estate for another or others without his or her broker’s consent and without including in the advertisement the name of the broker or firm with whom the provisional broker is associated.
- (2) A licensee shall not advertise or display a "for sale" or "for rent" sign on any real estate without the consent of the owner or his or her authorized agent.

(d) Business names. A licensee shall not include the name of a provisional broker or an unlicensed person in the name of a sole proprietorship, partnership or non-corporate business formed for the purpose of real estate brokerage.

(e) A person licensed as a limited nonresident commercial broker or provisional broker shall comply with the provisions of Rule .1809 of this Subchapter in connection with all advertising concerning or relating to his or her status as a North Carolina licensee.

GENERAL STATUTES CONCERNING ASSUMED NAMES

Business under Assumed Name Regulated.

G.S. 66-68. Certificate to be filed; contents; exemption of certain partnerships and limited liability companies engaged in rendering professional services; withdrawal or transfer of assumed name.

(a) Unless exempt under subsection (e) hereof, before any person or partnership engages in business in any county in this State under an assumed name or under any designation, name or style other than the real name of the owner or owners thereof, before any limited partnership engaged in business in any county in this State other than under the name set out in the Certificate filed with the Office of the Secretary of State, before any limited liability company engages in business in any county other than under the name set out in the articles of organization filed with the Office of the Secretary of State, or before a corporation engages in business in any county other than under its corporate name, such person, partnership, limited partnership, limited liability company, or corporation must file in the office of the register of deeds of such county a certificate giving the following information:

- (1) The name under which the business is to be conducted; and
- (2) The name and address of the owner, or if there is more than one owner, the name and address of each.

(b) If the owner is an individual or a partnership, the certificate must be signed and duly acknowledged by the individual owner, or by each general partner. If the owner is a corporation or limited liability company, it must be signed in the name of the corporation or limited liability company and duly acknowledged as provided by G.S. 47-41.01 or G.S. 47-41.02.

(c) Whenever a general partner withdraws from or a new general partner joins a partnership, a new certificate shall be filed. For limited partnerships, the requirement of this subsection (c) shall be deemed satisfied if the partnership is identified as the owner as provided in subsection (a) and the partnership's certificate of limited partnership is amended as provided in G.S. 59-202.

(d) It is not necessary that any person, partnership, limited liability company, or corporation file such certificate in any county where no place of business is maintained and where the only business done in such county is the sale of goods by sample or by traveling agents or by mail.

(e) Any partnership or limited liability company engaged in rendering professional services, as defined in G.S. 55B-2(6), in this State, shall be exempt from the requirements of this section if it shall file annually with the licensing board responsible for regulating the rendering of such professional services, or at such intervals as shall be designated from time to time by such licensing board, a listing of the names and addresses of its partners or members. The listing shall be open to public inspection during normal working hours.

(f) Any person, partnership, limited liability company, or corporation executing and filing a certificate of assumed name as required by this section may, upon ceasing to engage in business in this State under the assumed name, withdraw the assumed name or transfer the assumed name to any other person, partnership, or corporation by filing in the office of the register of deeds of the county in which the certificate of assumed name is filed a certificate of withdrawal or a certificate of transfer executed as provided in subsection (b) of this section and setting forth:

- (1) The assumed name being withdrawn or transferred;
- (2) The date of filing of the certificate of assumed name;
- (3) The name and address of the owner or owners of the business;
- (4) A statement that such owner or owners have ceased engaging in business under the assumed name;
- (5) If the assumed name is to be withdrawn, the effective date (which shall be a date certain but not more than 20 days from the date of filing) of the withdrawal if it is not to be effective upon the filing of the certificate of withdrawal; and

(6) If the assumed name is to be transferred, the name and address of the transferee or transferees, and the effective date (which shall be a date certain but not more than 20 days from the date of filing) of the transfer if it is not to be effective upon the filing of the certificate of transfer. This subsection does not relieve a transferee of the obligation to file a certificate of assumed name as required by this Article.

§ 66-69. Index of certificates kept by register of deeds.

Each register of deeds of this State shall keep an index which will show alphabetically every assumed name with respect to which a certificate is hereafter so filed in his county. The index shall also contain notations of any certificates of withdrawal or certificates of transfer filed in the county.

§66-69.1. Copy of certificate prima facie evidence.

A copy of such certificate duly certified by the register of deeds in whose office it has been filed shall be prima facie evidence of the facts required to be stated herein.

§66-70. Repealed by Session Laws 1969, c. 751, s. 45.

§66-71. Violation of Article a misdemeanor; civil penalty.

(a) Any person, partner or corporation failing to file the certificate as required by G.S. 66-68(a) or G.S. 66-68(c) --

(1) Shall be guilty of a Class 3 misdemeanor, and

(2) Shall be liable in the amount of fifty dollars (\$50.00) to any person demanding that such certificate be filed if he fails to file the certificate within seven days after such demand. Such penalty may be collected in a civil action therefor.

(b) The failure of any person to comply with the provisions of this Article does not prevent a recovery by such person in any civil action brought in any of the courts of this State.